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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 977

ROBERT E. FUNKHOUSER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 1a) is reported at 299 F. 2d 940. The opinion of the district court is reported at 198 F. Supp. 708.

JURISDICTION

The judgment of the court of appeals was entered on March 27, 1962 (Pet. App. 1a). Rehearing was denied on April 13, 1962 (Pet. App. 3a). The petition for a writ of certiorari was filed on May 16, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner is entitled to correction of sentence under Rule 35, F.R. Crim. P., because of alleged insufficiency of the evidence, lack of jurisdiction of the district court, invalidity of the indictment or denial of choice of counsel.

2. Whether petitioner filed a timely notice of appeal from the judgment of conviction.

RULE INVOLVED

Federal Rules of Criminal Procedure:

Rule 37. Taking Appeal; and Petition for Writ of Certiorari

(a) *Taking Appeal to a Court of Appeals.*

* * * * *

(2) Time for Taking Appeal. An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from.

STATEMENT

Petitioner was convicted by a jury of five counts of income tax evasion on June 5, 1952, was sentenced to one year's imprisonment and a $25,000 fine on June 6, 1952, and, on the same day, elected in writing not to appeal his conviction but to commence serving his sentence (Supp. R. 24–25).[1] Petitioner served his sentence, paid his fine, and was ultimately paroled. No notice of appeal was filed within the time prescribed by Rule 37 of the Federal Rules of Criminal Procedure, and an untimely motion to extend the time for taking an appeal was filed and denied.

Nearly six years later, on March 28, 1958, petitioner filed a motion under Rule 35 of the Federal Rules of Criminal Procedure to correct the sentence imposed on June 6, 1952. This motion was denied. *Funkhouser* v. *United States*, 260 F. 2d 86 (C.A. 4), certiorari denied, 358 U.S. 940.

After denial of certiorari in 1959, petitioner renewed the motions and amplified his pleadings in the district court. The motions were denied after a hearing. On appeal, petitioner presented for the first time in an appendix to his brief a letter which he contended to be a timely notice of appeal filed by him with Judge W. Calvin Chesnut on June 6, 1952 (R. 55). Thereafter, the United States introduced a letter sent by petitioner to Judge Chesnut on June 6, 1952, and which was received by Judge Chesnut, stating that petitioner appreciated the fair treatment given him by the judge at the trial. On the ground that it was

[1] "R." and "Supp. R." refer, respectively, to the appendices to petitioner's and the government's briefs in the court below.

inappropriate to consider petitioner's new factual issue for the first time on appeal, the court of appeals remanded the matter to the district court with instructions to receive evidence upon the issue thus raised. *Funkhouser* v. *United States*, 282 F. 2d 341 (C.A. 4).

At the hearing in the district court, Judge Chesnut and his secretary testified that the purported letter of June 6, 1952, had never been received by him (Supp. R. 13–20). Based upon the evidence presented at the hearing, the court held (*United States* v. *Funkhouser*, 198 F. Supp. 708, 711 (D. Md.)):

> I find that the disputed letter was never sent but was fabricated long after its purported date. I would cite defendant for perjury in connection therewith if I did not believe that his obsession with having his name cleared has affected his judgment. I conclude that he is entitled to no relief on this issue.

ARGUMENT

1. The court of appeals denied rehearing on this appeal on April 13, 1962. Since petitioner's motion to correct sentence under Rule 35 of the Federal Rules of Criminal Procedure is in a criminal case, he had thirty days to file a petition for writ of certiorari. Rule 22(2) of the Rules of this Court. Petitioner, however, did not file his petition until May 16, 1952, three days after the expiration of the thirty-day period and therefore his petition is out of time.

2. In any event, even if the petition were not out of time, petitioner's contentions are without merit.

a. Petitioner contends that his motion to correct sentence should have been granted because he was convicted prior to a precise computation and assessment of his civil tax liability. This contention which was rejected by this Court on petitioner's earlier attempt to obtain certiorari, misconceives the scope of a motion to correct sentence under Rule 35 of the Federal Rules of Criminal Procedure and is, in any event, without substance.

Rule 35 authorizes the correction only of sentences which the judgment of conviction did not authorize. *United States* v. *Morgan*, 346 U.S. 502, 506; *Cook* v. *United States*, 171 F. 2d 567, 570 (C.A. 1), certiorari denied, 336 U.S. 926; *Fooshee* v. *United States*, 203 F. 2d 247 (C.A. 5). Petitioner's motion did not, and could not, assert that the sentence here imposed was not within the maximum (imprisonment for five years and fine of $10,000) authorized for each violation of Section 145(b) of the Internal Revenue Code of 1939. In contending that a precise computation and assessment of his civil tax liability were conditions precedent to any criminal prosecution for wilful attempted tax evasion, petitioner is, in effect, challenging the sufficiency of the evidence to convict. Even if such a motion under Rule 35 were available as a substitute for an appeal, there is no merit in the contention. *Ford* v. *United States*, 233 F. 2d 56, 58–59 (C.A. 5), certiorari denied, 352 U.S. 833; *Commerford* v. *United States*, 64 F. 2d 28, 30 (C.A. 2), certiorari denied, 289 U.S. 759.

b. Petitioner suggests (Pet. 15) that the court which convicted him did not have jurisdiction. He reasons

that venue was in the District Court for the District of Columbia, where he was a resident, and not in the District Court for the District of Maryland, where petitioner filed his income tax return. But, as the court of appeals held on petitioner's appeal on his earlier motion to correct sentence, venue was properly in the latter district because that is where the crime was actually committed. 260 F. 2d 86; accord, *Bowles* v. *United States*, 273 F. 2d 772 (C.A. 4), certiorari denied, 294 U.S. 710.

c. Petitioner contends that the indictment was improperly signed by an Assistant United States Attorney who presented the case to the jury in the name of the United States Attorney, Bernard J. Flynn.[2] First, even if this was error, it was not a ground for correction of sentence under Rule 35. Second, it is well established that an error in the signature of the indictment by the prosecuting attorney, or, indeed, his failure to sign it at all, does not invalidate the indictment. *E.g.*, *In re Lane*, 135 U.S. 443, 449; *Wheatley* v. *United States*, 159 F. 2d 599, 600–601 (C.A. 4). Similarly, Rule 52(a) of the Federal Rules of Criminal Procedure, provides that "[a]ny error, defect, irregularity or variance which does not affect

[2] Petitioner stresses (Pet. 12–13, 16, 17) a statement made by Mr. Flynn that petitioner had been mistaken by the government with another Mr. Funkhouser. Mr. Flynn, who did not present the case to the grand jury, was apparently momentarily confused by the similarity of petitioner's name to that of a party in another case. There is no doubt, however, that petitioner was clearly identified to the grand jury which indicted him, the petit jury which convicted him, and the court which sentenced him.

substantial rights shall be disregarded." A mistake in signing the indictment, even if the signature here was a mistake, clearly affected no substantial rights. Third, the district court held that the action in this case was consistent with the "long-standing practice" in the District of Maryland. 198 F. Supp. at 711. Rule 7(c) of the Federal Rules of Criminal Procedure provides that indictments "shall be signed by the attorney for the government." The practice of having Assistant United States Attorneys sign for their superiors, like typewritten signatures (*Wiltsey* v. *United States*, 222 F. 2d 600 (C.A. 4), is in no way inconsistent with this Rule.

d. Petitioner argues (Pet. 18–20) that he was prevented from retaining counsel of his own choosing to represent him at his trial by a rule of the district court requiring parties to be represented by attorneys with offices in the district. The district court held that no evidence supported this contention. On the contrary, the record shows that petitioner employed T. Howard Duckett; that Mr. Duckett, with the concurrence of the clerk of the district court, entered an appearance for petitioner at the start of the proceedings and this appearance was never stricken; that Mr. Duckett determined that the trial should be handled by another attorney and took the defendant to meet G. C. A. Anderson who subsequently represented petitioner; and that petitioner never complained at any time during the trial of his counsel's efforts. (198 F. Supp. at 712). Thus, it is clear that petitioner was represented by counsel of his own choice. Petitioner's

contentions that his counsel did not adequately represent him are on their face frivolous.

e. Finally, petitioner contends (Pet. 26–33) that he filed a timely notice of appeal from his original conviction. This claim is plainly without merit for three reasons. First, it is not an argument which is cognizable in a motion to correct sentence. Second, even if petitioner's claim is accepted and his motion is treated as an appeal, his substantive contentions are groundless. And third, it is clear that no timely notice of appeal was in fact filed.

The district court held, after an extensive hearing, that petitioner had not sent the purported letter dated June 6, 1952, to Judge Chesnut, indicating that he would appeal. As Judge Thomsen summarized the evidence before him (198 F. Supp. 708, 710–711):

> The admittedly genuine letter [also dated June 6, 1952] is written in ink, misspells the Judge's name, and contains figures different from those in the disputed letter, which is in pencil, correctly spells the Judge's name, and gives internal evidence of having been written after checking the record.
>
> Judge Chesnut denied receiving the disputed letter. Mrs. Riede testified that she did not recall receiving or seeing any such letter, although she always opened the Judge's mail. She further testified that it was Judge Chesnut's regular practice to transmit any such letter to the Clerk, with a covering letter or memorandum, and to reply to the writer.
>
> Judge Chesnut's fairness is proverbial; his scrupulousness in handling his correspondence with prisoners is an example to all judges. It

> is incredible that he would have failed to transmit such a letter to the Clerk.
>
> The conclusion that the disputed letter was never sent to Judge Chesnut is supported by other evidence. A copy of the genuine letter was found in defendant's clothes by his wife, but the whereabouts of the disputed letter during the eight years before it was produced is not shown. More importantly, the disputed letter was not mentioned in (1) the motion to extend time for appeal, filed on June 20, 1952, (2) a long letter defendant wrote Judge Chesnut on July 9, 1952, (3) a letter defendant wrote the Judge on December 3, 1952, in which he mentioned the genuine letter, (4) the motion which he filed in 1958, (5) the appeal from the ruling thereon, or (6) any of the motions which he filed in 1959.
>
> I find that the disputed letter was never sent but was fabricated long after its purported date. I would cite defendant for perjury in connection therewith if I did not believe that his obsession with having his name cleared has affected his judgment. I conclude that he is entitled to no relief on this issue.

It is of course established that a finding of fact may not be overturned on appeal unless clearly erroneous and unsupported by evidence in the record. *E.g.*, *Davis* v. *United States*, 328 U.S. 582, 593–594; *United States* v. *Johnson*, 327 U.S. 106, 111–113. The finding of the district court was supported by the testimony of Judge Chesnut, his secretary, and petitioner's trial counsel (Supp. R. 13–20, 23–27). No conflicting evidence other than petitioner's own self-serving declarations was introduced (Supp. R. 2–4).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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